KWONG YIK BANK BHD

v.

ANSONIA MANAGEMENT ASSOCIATES SDN BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-02-461-98]
25 NOVEMBER 1998
[1999] 1 CLJ JT(1)

CIVIL PROCEDURE: *Appeal - Memorandum of appeal - Appeal to High Court against interlocutory order of subordinate court - Record of appeal - Whether must include memorandum of appeal - Whether memorandum of appeal must be filed - Subordinate Courts Rules 1980, O. 49 r. 6 - Rules of the High Court 1980, O. 55 r. 2*

The instant appeal concerned a procedural point of law arising from the operation of O. 49 r. 6 of the Subordinate Courts Rules 1980 ('the SCR') and O. 55 r. 2 of the Rules of the High Court 1980 ('the RHC'). The issue was whether, in an appeal to the High Court from a decision of a subordinate court other than a decision made after trial, the appellant therein must file a memorandum of appeal.

Held:
Per Gopal Sri Ram JCA

[1] The true purpose and objective of O. 49 r. 6 of the SCR is to provide for a summary and speedy disposal of appeals against decisions of subordinate courts made in interlocutory proceedings, including those made under O. 26A of the SCR.

[1a] The decision of the High Court in *Sykt Kayu Bersatu Sdn Bhd & Ors v. UMW (Sarawak) Sdn Bhd* (which appeared to have been affirmed by the Court of Appeal in *Yupaporn Seangarthit v. Neil Allan Campbell Webb* and followed in some subsequent decisions of the High Court) would frustrate this very purpose for which O. 49 r. 6 of the SCR was enacted.

[1b] In the present case, the learned judge below had rightly followed the approach taken in *Vong Ban Hin v. Laksamana Realty Sdn Bhd* which reflected the correct interpretation of O. 49 r. 6 of the SCR and O. 55 r. 2 of the RHC. It was not necessary for the respondent to file a memorandum of appeal.

[2] A rule of court should not be given an interpretation which results in unfairness or which produces a manifest injustice.

[3] The dismissal of an application for leave to appeal is not an affirmation of the judgment appealed against.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Rayuan semasa ini berkaitan dengan perkara prosedur undang-undang yang berbangkit daripada pengendalian A. 49 k. 6 Kaedah-kaedah Mahkamah Rendah 1980 ('KMR tersebut') dan A. 55 k. 2 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT tersebut'). Isunya adalah samada, perayu semestinya memfailkan satu memorandum rayuan dalam sesuatu rayuan kepada Mahkamah Tinggi daripada keputusan mahkamah rendah yang selain dari keputusan yang dibuat selepas perbicaraan.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Tujuan sebenar dan objektif A. 49 k. 6 KMT tersebut adalah untuk memberikan pelupusan rayuan yang cepat dan secara terus terhadap keputusan-keputusan mahkamah rendah yang dibuat dalam prosiding interlokutori, termasuk yang dibuat di bawah A. 26A KMR tersebut.

[1a] Keputusan Mahkamah Tinggi dalam *Sykt Kayu Bersatu Sdn Bhd & Ors v. UMW (Sarawak) Sdn Bhd* (yang nampaknya telah diikrarkan oleh Mahkamah Rayuan dalam *Yupaporn Seangarthit v. Neil Allan Capbell Webb* dan diikuti dalam beberapa keputusan-keputusan Mahkamah tinggi yang berikutnya) akan mengecewakan tujuan ini sesungguhnya bagi yang mana A. 49 k. 6 KMR tersebut telah digubal.

[1b] Dalam kes semasa ini, hakim yang bijaksana telah dengan sewajarnya mengikuti pendekatan yang diambil dalam *Vong Ban Hin v. Laksamana Realty Sdn Bhd* yang menggambarkan pentafsiran betul akan A. 49 k. 6 KMR dan A. 55 k. 2 KMT tersebut. Ianya adalah tidak perlu bagi responden memfailkan satu memorandum rayuan.

[2] Kaedah mahkamah tidak seharusnya diberikan satu pentafsiran yang mana menyebabkan ketidak-adilan atau yang mana menghasilkan ketidak-adilan yang nyata.

[3] Penolakan sesuatu permohonan untuk kebenaran bagi merayu bukannya merupakan satu pengiktirafan penghakiman terhadap mana dirayui.

[Rayuan ditolak.]

Cases referred to:

Hendry v. De Cruz [1949] 2 MLJ 62 ***(cit)***

Hong Kong Bank Malaysia Bhd v. Sereedevi [1997] 2 CLJ Supp 517 ***(aff)***

Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 CLJ 491 ***(cit)***

Sykt Kayu Bersatu Sdn Bhd & Ors v. UMW (Sarawak) Sdn Bhd [1995] 1 CLJ 113 ***(ovrd)***

Vong Ban Hin v. Laksamana Realty Sdn Bhd [1996] 4 CLJ 852 ***(aff)***

Yupaporn Seangarthit v. Neil Allan Campbell Webb [1996] 1 CLJ 43 ***(not foll)***

Legislation referred to:

Rules of the High Court 1980, O. 55 r. 2

Subordinate Courts Rules 1980, O. 26A, O. 49 r. 6

For the appellant - Dennis Appaduray (Wong Rhen Yen with him); M/s Sidek Teoh Wong & Dennis

For the respondent - B Thangaraj; M/s Thangaraj & Assoc

[Appeal from High Court, Kuala Lumpur; Civil Appeal No: R3-12-302-96; [1998] 1 CLJ Supp 233]

[Editor's note: the following decisions of the High Court, to the extent to which they are inconsistent with the instant decision of the Court of Appeal, are overruled as well: Tan Ah Tee & Anor v. Paimon Kasiran [1996] 3 CLJ 313; Thye Ye Ind Sdn Bhd v. Malaysia Coconut Coir Ind Co [1996] 3 AMR 3908; Perdana Finance Bhd v. Azmi Ahmad & Ors [1997] 2 CLJ 325.
The following decisions of the High Court are, inter alia, affirmed: Pembinaan Nadzri Sdn Bhd v. Koon Hoe Co Sdn Bhd [1996] 2 CLJ 1038; Subran Kunhikuttan v. Aladath Putham Veetal Moidutty [1997] 4 CLJ 91; Nikodo (S) Pte Ltd v. GVC Karaoke Sdn Bhd [1997] 2 CLJ 906; Worldwide Laser Service Corp v. Excel Electronics & Industrial Suppliers Sdn Bhd [1998] 1 CLJ 1023.]

Reported by Gan Peng Chiang

JUDGMENT

Gopal Sri Ram JCA:

This appeal raises a short but important point of practice and procedure. It has to do with the operation of two rules of court which appear to have given rise to much difficulty and which govern appeals from the Subordinate Courts to the High Court. The rules in question are O. 49 r. 6 of the Subordinate Courts Rules 1980 (hereinafter referred as "the SCR") and O. 55 r. 2 of the Rules of the High Court 1980 (hereinafter referred as "the RHC"). They read as follows.

First, O. 49 r. 6 of the SCR which states:

(1) Notwithstanding anything contained in this Order, an appeal shall lie to a Judge in Chambers from any decision made by the court other than a decision made after trial.

(2) The appeal shall be brought by filing a notice of appeal in Form 140 within 14 days from the day on which the decision was pronounced, and serving a copy of the notice on every other party to the proceedings within the time limited for the filing of appeal to the Registrar of the High Court.

(3) Within three weeks after the filing of the notice of appeal, the appellant shall file the record of appeal in the High Court and the record shall contain copies of:

(a) the application for the decision;

(b) the statement of claim, and where defence has been filed, the statement of defence;

(c) all affidavits filed in support of or in opposition to the application; and

(d) the decision appealed from,

but shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal.

Next, O. 55 r. 2 of the RHC which provides as follows:

2(1) The appellant shall, within fourteen days from the date of service on him of the notice in Form 141 under Order 49, rule 2 sub-rule (4) or rule 3 sub-rule (2) of the Subordinate Courts Rules 1980 (as the case may be), file in the High Court in duplicate a memorandum of appeal in Form 113A.

(2) The appellant shall within the like period serve each respondent with a copy such memorandum and a copy of the appeal record.

The point of difficulty that has arisen in the application of these two rules is whether a memorandum of appeal is required to be filed by the appellant in cases where he appeals against a decision other than one made after trial.

Our attention has been drawn to a number of reported judgments where conflicting views have been expressed by judges of great learning. The views include those of the leave bench of this court in *Yupaporn Seangarthit v. Webb* [1996] 1 CLJ 43; [1995] 3 MLJ 705. In that case, Mahadev Shankar JCA, described the function of O. 49 r. 6 of the SCR in the following terms:

> Its objective was to reduce the delay caused in the registration of appeals by the non-availability of the grounds of decision and notes of evidence which can take a long time in the lower courts. So for orders obtained before trial parties were allowed to compile the record by merely including the pleadings, affidavits, and the decision appealed from together with the written application therefor. Once the appeal was registered, the grounds of judgment and notes of evidence could come later.

With respect, we are unable to agree with these views. Suffice for us to say that, in our judgment, the true purpose and objective in O. 49 r. 6 of the SCR was to provide for a summary and speedy disposal of appeals against decisions of the Subordinate Courts made in interlocutory proceedings including an application under O. 26A of the SCR.

If these rules are read in the way in which they were by Richard Malanjum J, in *Syarikat Kayu Bersatu Sdn. Bhd. v. UMW (Sarawak) Sendirian Berhad* [1995] 1 CLJ 113 and by his learned brethren who followed his line of reasoning, the result would be to frustrate the very purpose for which O. 49 r. 6 of the SCR was enacted in 1993. For the result of these decisions is that the summary disposal of an interlocutory appeal by way of re-hearing would in effect be no different from an appeal from a decision after trial. That is certainly not the purpose behind O. 49 r. 6.

It is a well settled principle of statutory interpretation that the intention of the lawmaker is to be gathered from the words he employs in making the particular written law. In the case of rules of court, which are indeed written law, there is an additional principle. It is this. A rule of court should not be given an interpretation that would result in unfairness or produce a manifest injustice. See, *Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 CLJ 491; [1995] 1 MLJ 292.

Applying this principle to the rules before us, we come to the conclusion that the interpretation afforded them by these cases cited in support of the appeal by Mr. Dennis Appaduray of counsel for the appellant will produce unfairness or manifest injustice to an appellant appealing against the interlocutory order made by the Subordinate Court.

That brings us to the present appeal. Here, the learned judge, in our judgment, very properly decided to follow the judgment of Augustine Paul JC (as he then was) in *Vong Ban Hin v. Laksamana Realty Sdn Bhd* [1996] 4 CLJ 852 which we think reflects the correct approach to the question of interpreting the rules with which we are concerned in the present appeal. We are therefore unable to find fault of the reasoning of the learned judge of the present case and are driven to the conclusion that he was entirely right at arriving at the decision. It follows that we must; and we do; reverse and overrule the decision in *Syarikat Kayu Bersatu (ibid)*, and the cases which followed it.

We are, of course, conscious of the principle that this court is bound by its own decisions. See, *Hendry v. De Cruz* [1949] 2 MLJ 62. But we arrive at the same conclusion at which Augustine Paul JC, arrived at in *Vong Ban Hin (ibid)* and in *Hong Kong Bank Malaysia Berhad v. Sereedevi* [1997] 2 CLJ Supp 517; [1997] 3 MLJ 605, in that the views expressed by Mahadev Shankar JCA, in *Yupaporn Seangarthit v. Webb (supra)* were in the course of considering an application for leave to appeal where, strictly speaking, reasons are unnecessary and are usually not delivered. It is trite law that a refusal of leave is not an affirmation of the judgment appealed against. Further, as pointed out by Mokhtar Sidin JCA, during argument before us this morning, those observations were purely *obiter dicta* and not *ratio decidendi* since they were not necessary for arriving at a decision in that case.

In the result, we would dismiss this appeal and affirm the order made by the learned judge. We make no order as to costs. The deposit paid into court by the appellant is to be refunded to it.